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IN THE

Supreme Court of the United States

October Term, 1971
No. 71-30

GILMAR FORTIS,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of California

BRIEF OF RESPONDENT IN OPPOSITION

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BRIEF OF RESPONDENT IN OPPOSITION

Preliminary Statement

Petitioner seeks a writ of certiorari from this Court to the California Supreme Court to review its order denying petitioner's petition for hearing following the order of the California Court of Appeal, Second Appellate District, denying petitioner's petition for writ of mandate to compel the Los Angeles Superior Court to permit petitioner to set aside his plea of nolo contendere and enter a plea of not guilty to a charge of possession of marijuana. None of the California courts issued a written opinion in denying petitioner's applications.

The Petition for Writ of Certiorari was filed on July 6, 1971.

Jurisdiction

Jurisdiction is invoked apparently pursuant to Title 28, United States Code, section 1257(3).

Questions Presented

The Petition raises the following questions:

1. Whether petitioner's right to due process of law was violated by the trial court's acceptance of petitioner's plea of nolo contendere without resolving the conflict between that plea and petitioner's known claim of innocence.

2. Whether petitioner, an alien, waived his constitutional right to trial intelligently and with understanding of the consequences of his plea, when he was not made aware that his plea would necessitate his immediate deportation from the United States.

Statement of the Case

A. History of the Case[1]

In an information filed by the District Attorney of Los Angeles County on March 10, 1970, petitioner, together with Raymond Diaz and Louis Salandra, was charged in Count I with the felony of possession of marijuana in violation of California Health and Safety Code section 11530. In Count II of the information Diaz and Salandra were charged with the misdemeanor of knowingly being in a place where narcotics were

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[1]Since petitioner sought review in the state courts by writ rather than by appeal, a record was never prepared for the California appellate courts. Therefore, the instant Brief of Respondent in Opposition contains no citations to a record; reference is made by respondent to orders appearing in the files of the Los Angeles Superior Court in *People v. Fortis*, No. A254112, and in the files of the California Court of Appeal, Second Appellate District, in *Fortis v. Superior Court*, 2d Civ. 38077.

being used, a violation of California Health and Safety Code section 11556.

Following a preliminary hearing at which petitioner was held to answer, he pleaded not guilty. Petitioner moved unsuccessfully to set aside the information pursuant to California Penal Code section 995. Thereafter petitioner, with the consent of the prosecuting attorney and the trial court, withdrew his plea of not guilty and entered a plea of nolo contendere.[2]

After ordering and reading a probation report, the court on July 7, 1970, declared the offense a misdemeanor pursuant to California Penal Code section 17, suspended the proceedings, and placed petitioner on probation for a period of three years. Among the conditions of probation was that petitioner pay a fine of $300 plus penalty assessment.

On March 3, 1971, the matter came on calendar before the trial court for hearing on petitioner's motion to set aside his plea of nolo contendere, and the trial court denied the motion.

On March 5, 1971, petitioner filed a petition for writ of mandate in the California Court of Appeal, Second Appellate District. (*Fortis v. Superior Court,* 2d Civ. 38077.) On March 8, 1971, Division Four of that court entered the following order, without written opinion: "Denied. See probation report and reporter's transcripts in superior court file."

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[2]Among the pleas permitted by California law is that defined as follows by California Penal Code section 1016(3): "Nolo contendere, subject to the consent of the district attorney and with the approval of the court. The legal effect of such plea shall be the same as that of a plea of guilty, but the plea may not be used against the defendant as an admission in any civil suit based upon or growing out of the act upon which the criminal prosecution is based."

On March 18, 1971, petitioner filed a petition for hearing in the California Supreme Court seeking review of the order of the California Court of Appeal. The Petition for Hearing was denied on April 7, 1971, without written opinion.

Petitioner seeks certiorari to the California Supreme Court to review its order denying a hearing.

B. Statement of Facts[3]

Petitioner was born in 1936 in the country of El Salvador where, after completing twelve years of schooling, he resided until 1959, when he came to the United States. He is presently registered as an alien.

"*Present Offense:*

"On December 30, 1969, at approximately 12:00 midnight, the defendant was arrested by officers of the Los Angeles Police Department at 1119 North Madison, Number 17, in Los Angeles, and booked on suspicion of robbery. In the information he was charged with . . . possession of marijuana. . . .

"Also arrested were Raymond Diaz and Luis Salandra. . . .

". . . .

"The arresting officers, acting on information regarding narcotic activity, went to 1119 North Madison, number 17, in Los Angeles. The coar-

[3]The only reference in the Superior Court proceedings to the underlying facts of the case appears in the probation officer's report, which is part of the file in *People v. Fortis,* Los Angeles Superior Court No. A254112. The foregoing Statement of Facts is taken from that report, which is set forth in its entirety as Exhibit A to the Petition for Writ of Certiorari. The transcript of the preliminary hearing in municipal court provides a more complete record of the underlying facts.

restee, Diaz, opened the door, and the arresting officers smelled a strong odor of burning marijuana. Upon entering they observed the coarrestee Salandra asleep in the living room and a burning marijuana cigarette in an ashtray. There were 30 roaches in the ashtray. The defendant (Fortis) was in the bedroom and he was observed sitting up in bed. A check of the headboard drawers revealed two guns and a quantity of seconals. The defendant (Fortis) requested his jacket and the officers recovered an additional quantity of marijuana from his pockets.

"*Defendant's Statement:*

"The defendant submitted a one-page typewritten statement, which is quoted in part as follows:

" 'This letter is a written plea to request leniency regarding my case and conviction.

" 'I hope you will bear in mind that I will again be gainfully employed as of Monday and that I do have a stable work record. The Company I will be working for, Chrysler Corp., was my former employer and they have reinstated me because of my satisfactory performance and record for them.

" 'I would also like to note that I will be preparing for my qualifications as a citizen of the United States. I only hope that my conviction will not be detrimental to this goal.

" 'In closing I would like to request that I seriously be considered for probation and a chance to prove myself as a reliable person. I feel I can do this and I hope that you will give me the opportunity to do so.'

"Orally, the defendant states that he had an apartment and permitted some of his friends to spend nights there with him. '. . . the police came and woke us up, putting a gun in my friend's face. They searched the place and found some joints in the apartment. They also said there were some anti-American literature in the place. I found a box of books and brought them up to the apartment . . . one of the guys must have found the marijuana there, I was asleep and knew nothing of it. I wasn't smoking any . . . I don't know, but this is like a nightmare for me . . .'" (*See* Petition, pp. 13-17.)

ARGUMENT

Petitioner's Plea of Nolo Contendere to a Charge of Possession of Marijuana Was Not Rendered Constitutionally Invalid by the Trial Court's Awareness That Petitioner Denied Committing the Offense or by Petitioner's Unawareness That His Plea Would Necessitate His Immediate Deportation From the United States

Petitioner challenges the validity of both his initial plea of nolo contendere[4] and the trial court's subsequent order refusing petitioner leave to withdraw that plea and enter a plea of not guilty.

As indicated in the probation report, from which the above Statement of Facts is taken, petitioner is a native of the country of El Salvador, having entered the United States some twelve years ago, and is presently registered as an alien.

The record[5] indicates that with reference to the present charge of possession of marijuana, petitioner on April 30, 1970, with the permission of the trial court and the prosecuting attorney, withdrew his plea of not guilty and entered a plea of nolo contendere after discussing the matter with his attorney and after expressly waiving his right to jury trial, to confront and cross-examine witnesses to freedom from self-incrimination, and to present a defense and subpoena witnesses on his behalf. Petitioner stated on the record that no promises, threats, or coercion had been directed to him regard-

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[4]The legal significance of such a plea is indicated in footnote 2, *infra. See also North Carolina v. Alford,* 400 U.S. 25, 35-36 (n. 8).

[5]A reporter's transcript of the proceedings on April 30, 1970, is part of the record in the Los Angeles Superior Court. That transcript is reproduced as Exhibit B to the Petition for Writ of Certiorari.

ing sentencing or probation, that he knew that the trial court would make the sole determination as to his sentence, and that his plea was being entered voluntarily.

However, petitioner declined to state that he was entering his plea for the reason that he had in fact been in possession of marijuana as charged; instead he stated that the plea of nolo contendere was being entered because he desired not to contest the charge. In his subsequent statement to the probation officer, petitioner affirmatively denied guilt of the charged offense.

Subsequently the following proceedings took place before the trial court on July 7, 1970, after probation was granted with the consent of the prosecuting attorney:[6]

> "Mr. Patrusky [petitioner's attorney]: . . . .
>
> "One additional matter, and this is something I discussed with Mr. Pachtman [the prosecuting attorney] prior to the disposition of this matter, because of the defendant's status as an alien.
>
> "Your Honor will recall from the report the defendant has been living in the United States since 1959. He is preparing for a citizenship [*sic*]. Mr. Kirkpatrick's report, the last line prior to the recommendation, indicates the probation officer's own desire to see the defendant remain within the United States.
>
> "It is for that reason that I request the Court to declare this to be a misdemeanor. I have discussed this with Mr. Pachtman at the time we read

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[6]The following proceedings are taken from the reporter's transcript of that date, which transcript is part of the Superior Court file. This transcript is not among the portions of the record appended to the instant Petition.

> the probation report and he indicated he would have no objection to the Court making such a declaration."

Thereafter with the consent of the prosecuting attorney the trial court fixed the offense as a misdemeanor, and petitioner was placed on probation.

Several months later petitioner moved the trial court for leave to withdraw his plea of nolo contendere. In support of his motion he and his attorney filed declarations under penalty of perjury (Appendices C and D to the instant Petition) which stated that petitioner was lawfully in the United States, was gainfully employed, had never been charged with other violations of the law, was innocent of the present charge and had always maintained his innocence, and had never been advised that his plea of nolo contendere "could and would result in deportation" pursuant to Title 8, United States Code, section 1251(a)(11).

Petitioner further stated in his declaration that "a Deportation Proceeding has been initiated by the United States Department of Justice, case No. A10761351, and that I am in imminent danger of immediate deportation." (Petition, p. 28.) Petitioner's present counsel has indicated that these deportation proceedings are being stayed pending determination of the present Petition for Writ of Certiorari.

Section 1251(a)(11) provides in part that:

> "Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who—
>
> "(11) is . . . or . . . who at any time has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana . . ."

The aforementioned portions of the record indicate affirmatively that petitioner made a knowing and intelligent waiver of his constitutional rights when he entered his plea of nolo contendere. (*See* Petition, pp. 20-27.) There clearly was complete compliance with the requirements set forth in *Boykin v. Alabama*, 395 U.S. 238, with regard to the taking of a plea.

The record shows that petitioner, his counsel, the prosecuting attorney, and the trial court were all aware of the possibility of deportation. The trial court took that possibility into account in fixing petitioner's offense as a misdemeanor. That some or all of the various parties might have labored under the mistaken impression that a misdemeanor conviction would not result in deportation cannot deprive the proceedings of validity under due process standards. This is particularly so in view of the clear indication that petitioner consulted with counsel prior to entering his plea.

Petitioner apparently would seek to have this Court require that any trial judge having reason to believe that a defendant is an alien, include in the *Boykin* admonition advice that such a defendant may be deported if convicted upon his plea.

The *Boykin* opinion of course says nothing about such advice. *Boykin's* requirements certainly encompass the basic constitutional rights which an ordinary defendant will be relinquishing upon entering a plea, and it would be impossible for a trial court to envisage every possible consequence of the defendant's proposed plea. If petitioner is correct, it might well be required that trial courts give other admonitions related to the various penalties and disabilities which might attend the conviction of particular defendants. Such ad-

monitions might then have to include matters such as loss of professional or vocational license, and loss of government or defense-industry job clearance.

Clearly this would be an impossible burden to impose upon trial courts and prosecutors. Moreover, it is questionable what would be accomplished by such admonitions. Unlike perhaps the matter of one's courtroom rights, the possibility of deportation must clearly be in mind when an alien enters a plea of guilty or nolo contendere to a criminal charge. So would the other consequences, given above by way of example, be in mind upon the making of a plea of guilty or nolo contendere.

Although the federal courts are split as to whether the unavailability of parole is a consequence of which a defendant must be informed prior to entering his plea of guilty, *see Bye v. United States*, 435 F.2d 177, 179-80 (2d Cir. 1970), and cases cited; *Trujillo v. United States*, 377 F.2d 266, 268-69 (5th Cir. 1967), *cert. denied*, 389 U.S. 899, it has been held that loss of passport and right to travel abroad is not such a consequence, *Meaton v. United States*, 328 F.2d 379, 380-81 (5th Cir. 1964), *cert. denied*, 380 U.S. 916, nor discharge from military service, *Redwine v. Zuckert*, 317 F.2d 336, 338 (D.C. Cir. 1963), loss of right to vote, *United States v. Cariola*, 323 F.2d 180, 186 (3d Cir. 1963), or being barred from litigating the issue of civil tax fraud. *United States v. Carlino*, 400 F.2d 56, 57 (n.1) (2d Cir. 1968), *cert. denied*, 394 U.S. 1013.

On the specific issue whether deportation is a consequence of conviction that a defendant must have in mind in deciding to enter a plea of guilty, the Second

Circuit, United States Court of Appeals, in a split decision, held as follows:

> "Generally in criminal cases, the defendant's surprise as to the severity of sentence imposed after a plea of guilty, standing alone, is not such manifest injustice as to require vacation of the judgment and permission to withdraw a plea of guilty. True, when surprise stems from a misunderstanding, reasonably entertained, of remarks by the Judge himself . . . or from assurances by the United States Attorney, it may be ground for post-conviction relief. But surprise, as in the instant case, which results from erroneous information received from the defendant's own attorney, at least without a clear showing of unprofessional conduct, is not enough.
>
> "Moreover, here the subject-matter of the claimed surprise was not the severity of the sentence directly flowing from the judgment but a collateral consequence thereof, namely, deportability. This is a liability which may, and in this case does, depend on a conviction of crime. But it is nonetheless a collateral consequence of conviction. It is true that many statements in judicial opinions and by text-writers may be found —and the appellant here cites several such—to the general effect that a defendant should not be holden to a plea of guilty made without an understanding of the consequences. But neither the generalities found in the texts nor the facts underlying such judicial opinions suggest that the authors of such statements meant to imply that the finality of a conviction on a plea of guilty depended upon a contemporaneous realization by

the defendant of the collateral consequences thereof. Certainly, the appellant fails to cite a single case so holding. And research of our own fails to disclose a case even intimating a rule of such breadth.

". . . .

"We do not fail to recognize the terrific impact on the defendant's life and family of the collateral consequence of deportation. But deportability is determined by the Immigration and Nationality Act of 1952, 8 U.S.C.A. § 1102 et seq. And even if we felt that the inflexibility of that Act was unduly harsh in its application to this particular defendant or to others, we may not properly let sympathy, thus engendered, by intrusion into the field of criminal administration disturb the finality of criminal process and thus undermine effective law enforcement." (Citations and footnotes omitted.)

United States v. Parrino, 212 F.2d 919, 921-22 (2d Cir. 1954), *cert. denied,* 348 U.S. 840.

But cf. Vizcarra-Delgadillo v. United States, 395 F.2d 70, 74 (9th Cir. 1968) (Browning, J., dissenting), *cert. dismissed,* 393 U.S. 957;

United States v. Shapiro, 16 F.R.D. 499, 501 (E.D. Wisc. 1955), *appeal dismissed,* 222 F. 2d 836 (7th Cir. 1955).

In *United States v. Briscoe,* 432 F.2d 1351, 1353-54 (D.C. Cir. 1970), the court held that "the fact that a defendant has been *misled* as to consequence of deport-

ability may render his guilty plea subject to attack" (emphasis added), and furthermore that

> "Calculations of the likelihood of deportation may thus rightly be included in the judgment as to whether an accused should plead guilty, and any *actions by Government counsel* that create a misapprehension as to that likelihood may undercut the voluntariness of the plea." (Emphasis added.)

The court went on to distinguish the case before it, noting the absence of any actions by the prosecuting attorney or the trial court which might have misled the defendant with respect to the consequence of deportation following his conviction upon a plea of guilty.

Similarly in the case at bar there is nothing to indicate that the trial court or the prosecuting attorney in any way misled petitioner.

This Court has held that a plea of guilty will not be held invalid merely because the defendant is motivated to accept the certainty or probability of a lesser penalty rather than face the possibility of acquittal or on the other hand the higher penalty authorized by law. *Brady v. United States*, 397 U.S. 742, 751. Furthermore, the fact that defense counsel may have failed to advise petitioner, or may have incorrectly advised petitioner, as to the consequences of petitioner's projected plea of guilty does not invalidate the plea. *McMann v. Richardson*, 397 U.S. 759, 769-71, 774; *Parker v. North Carolina*, 397 U.S. 790, 796-98.

Petitioner's claim that his plea was rendered constitutionally invalid by the trial court's awareness that petitioner denied committing the offense, is without merit in light of this Court's decision in *North Carolina v. Alford*, 400 U.S. 25.

In that case the Court noted:

> "An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." *Id.*, 37.

The Court in the *Alford* case found it immaterial whether upon entering his plea the defendant refused to admit commission of the offense or on the other hand entered his plea with an affirmative protestation of innocence. Nor did the Court view as significant whether the plea was one of not guilty as opposed to nolo contendere. *Id* 37.

The Court held:

> "In view of the strong factual basis for the plea demonstrated by the State and Alford's clearly expressed desire to enter it despite his professed belief in his innocence, we hold that the trial judge did not commit constitutional error in accepting it." (Footnote omitted.) *Id.*, 38.

Similarly in the case at bar, the probation report, portions of which are set forth in the Statement of Facts herein, reflects a strong factual basis for petitioner's conviction even though that report was prepared subsequent to the entry of petitioner's plea. The facts indicate a strong likelihood that petitioner was indeed in unlawful possession of marijuana at the time of his arrest.

Respondent submits that petitioner's plea was constitutionally valid at the time it was entered and that petitioner had no right to withdraw that plea at the subsequent hearing.

Conclusion

For the foregoing reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted.

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